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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 48

PACIFIC STATES BOX AND BASKET COMPANY,
Appellant,

v.

MAX GEHLHAR, as Director of Agriculture for the State of Oregon, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Oregon.

APPELLEES' BRIEF

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APPELLEES' BRIEF

STATEMENT

Appellees do not deem it necessary to make a statement of facts additional to that in appellant's brief.

ARGUMENT

Summary

Appellees' argument in this case may be summarized as follows:

1. The right of appellant, a California corporation, not licensed to do business in the state of Oregon, to

sell its products for use in that state is not property within the meaning of that term as used in the due process of law and equal protection of the laws clauses of the 14th Amendment to the Federal constitution.

2. It is not a Federal agency, and the statutes and orders of which it complains do not directly prevent it from selling its products to residents of Oregon and shipping them into that state in interstate commerce. The state regulations of which it complains apply only to the use of such products after they have arrived in the state and original packages have been broken. Consequently, they do not directly affect interstate commerce of appellant, and its objections to same do not present a substantial Federal question.

3. The statutes and orders involved apply equally to every person and corporation affected thereby. They were not intended to and do not create a monopoly in favor of Oregon manufacturers and against appellant.

4. The statutes and orders are reasonable and necessary for the promotion of the public welfare of the state, and they therefore constitute a reasonable exercise of the police power.

5. The terms of the orders regulating dimensions of containers do not conflict with Federal regulations.

6. The burden is upon appellant to show that the statutes and orders exceed the constitutional power of the state in the particulars in which they apply it.

7. The record does not rebut the presumption that constitutional powers have not been exceeded.

8. The statutes involved do not require that the orders of the Department of Agriculture be supported by findings.

9. The contention that the statutes involved constitute an unlawful delegation of legislative authority to administrative officers is not open to consideration by this court, for the reason that it was not raised in the court below nor assigned as error in this court.

10. There has been no unlawful delegation of legislative power in connection with the issuance of the orders complained of in this case.

POINT I

Appellant has no property right to sell its products in Oregon in violation of the public policy of that state.

The Bank of Augusta v. Earle, 13 Pet. 519, 590, 594, 10 L. Ed. 274, 309, 310.

Pembina Consolidated Silver Min. Co. v. Pennsylvania, 125 U. S. 181, 184, 185, 189, 31 L. Ed. 650, 652, 653.

Hooper v. State of California, 155 U. S. 648, 652, 39 L. Ed. 297, 299.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. Ed. 657, 663.

Munday v. Wisconsin Trust Co., 252 U. S. 499, 503, 64 L. Ed. 684, 689.

Nebbia v. New York, 291 U. S. 502, 525, 537, 539, 78 L. Ed. 940, 950, 957, 958.

Appellant's contentions in the lower court were (R. 7):

(1) That the statutes and order complained of deprive appellant of property without due process of law; (2) deny to appellant the equal protection of the laws, and grant a monopoly to Oregon manufacturers of the type of containers specified in said orders; and (3) that they interfere with and impose unlawful burdens on the interstate commerce and business of appellant.

The penalties involved (see Appendix to Appellant's Brief) do not in any particular apply to appellant. Their indirect or incidental effect upon appellant is limited to the pecuniary loss it may sustain through being deprived of the right to sell for use in the state of Oregon the particular type of pint containers which it manufactures for strawberries and raspberries. The record does not disclose any claim that containers of the type required for use in Oregon are not suitable for the purposes for which they are to be used.

The jurisdiction of the District Court was invoked upon the ground, among others, (R. 3) that:

> "The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.";

(R. 5):

> "That the right to continue to sell such tin-top berry baskets or cups to dealers in the State of Oregon is of great value to Plaintiff, far exceeding the sum of $3,000.00. That Plaintiff also sold a very large number of said baskets or cups to dealers in California for packing strawberries and raspberries for sale in Oregon."

The injury which it is alleged would result to appellant from the enforcement of the order is, so far as the record in this case discloses, peculiar to it alone.

Objection has been made by appellant to the statement that it is not licensed to do business in the state of Oregon. Appellant, however, does not contradict the statement. There is no presumption that it is so licensed.

Appellant is not an agency of the United States.

Nebbia v. New York, 291 U. S. 502, 525, 537, 539, 78 L. Ed. 940, 950, 957, 958:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to to. proper legislative purpose, and are neither arbitrary

nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

"The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people."

The Bank of Augusta v. Earle, 13 Pet. 519, 590, 10 L. Ed. 309:

"The intimate union of these States, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. * * *"

Pembina Consolidated Silver Min. Co. v. Pennsylvania, 125 U. S. 181, 189, 31 L. Ed. 653:

"* * * The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. * * *."

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. Ed. 657, 663:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the state of Texas? This is the only inquiry, and it can not find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the powers of the state over them. * * *"

Hooper v. State of California, 155 U. S. 648, 652, 653, 39 L. Ed. 297, 299:

"The principle that the right of a foreign corporation to engage in business within a state other than that of its creation, depends solely upon the will of such other state, has been long settled, and many phases of its application have been illustrated by the decisions of this court. (Citing many cases.)

Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the Federal nature of its business. * * *"

Munday v. Wisconsin Trust Co., 252 U. S. 499, 503, 64 L. Ed. 684, 689:

"Where interstate commerce is not directly affected, a state may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. (Citing cases.)"

POINT II

The effect upon interstate commerce is too indirect to present a substantial Federal question.

Packer Corporation v. Utah, 285 U. S. 105, 76 L. Ed. 643, 648.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 519, 46 L. Ed. 298, 306.

Savage v. Jones, 225 U. S. 501, 520, 524, 539, 56 L. Ed. 1182, 1184, 1189, 1191, 1197.

Hygrade Provision Co. v. Sherman, 266 U. S. 497, 503, 69 L. Ed. 402, 408.

The affidavit in support of application for interlocutory injunction (R. 26) states the amount of appellant's net receipts from shipments to Oregon during the years 1932 and 1933 to have been $6,699.62, after deducting freight charges, but does not disclose whether or not there were other expenses and costs of doing business to be deducted from profits derived from its sales in Oregon.

In *Packer Corporation v. Utah*, 285 U. S. 105, 76 L. Ed. 643, it was contended that a statute of Utah which prohibited the advertising of tobacco on billboards violated the commerce clause of the Federal constitution because it operated to prevent the display of posters shipped from another state. It was held (p. 111, U. S. Rep.; 648 L. Ed.) that:

> "* * * So far as the posters are concerned, assuming them to be articles of commerce, compare Charles A. Ramsay Co. v. Associated Bill Posters, 260 U. S. 501, 511 67 L. Ed. 368, 370, 43 S. Ct. 170, the statute is aimed, not at their importation, but at their use when affixed to billboards permanently located in the state. Compare Browning v. Waycross, 233 U. S. 16, 22, 23, 58 L. Ed. 828, 832, 833, 34 S. Ct. 578; General R. Signal Co. v. Virginia, 246 U. S. 500, 510, 62 L. Ed. 854, 858, 38 S. Ct. 360. * * *"

No person is prohibited from purchasing appellant's containers or from shipping them into the state of Oregon in original packages. The regulations do not apply to such containers until after the original packages have been broken. They are not then in interstate commerce.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 519, 46 L. Ed. 306:

"* * * The interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state. New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 439, 39 L. Ed. 1043, 1045, 15 Sup. Ct. Rep. 896; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953, 17 Sup. Ct. Rep. 532."

Savage v. Jones, 225 U. S. 524, 525, 56 L. Ed. 1191:

"But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not, invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. * * *"

Hygrade Provision Co. v. Sherman, 266 U. S. 503, 69 L. Ed. 408:

"2. Lewis & Fox Company is a Massachusetts corporation conducting a general provision supply business, including the shipment and sale of original packages into and within the state of New York. It is this situation which forms the basis of the contention that the commerce clause is violated. It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce. Sligh v. Kirkwood, 237 U. S. 52, 60, 61, 59 L. Ed. 835, 838, 839, 35 Sup. Ct. Rep. 501; Savage v. Jones, 225 U. S. 501, 524-526, 56 L. Ed. 1182, 1191, 1192, 32 Sup. Ct. Rep. 715."

It is respectfully submitted that this appeal should be dismissed upon the grounds that the enforcement of the statutes and orders complained of will not result in depriving appellant of its property without due process of law; deny it the equal protection of the laws; abridge any privileges or immunities of appellant; create a monopoly in favor of Oregon manufacturers, nor will they directly interfere with and impose unlawful burdens on the interstate commerce of appellant, or otherwise affect interstate commerce to such extent as to present a substantial Federal question.

Without waiver of the objections and grounds hereinbefore stated, appellees further urge:

POINT III

No monopoly is created in favor of Oregon manufacturers and against appellant.

McGoun v. Illinois, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 542, 75 L. Ed. 1248, 1258.

The statutes and orders complained of do not deny to foreign corporations any privileges or immunities that are not denied to domestic corporations under the same circumstances. Appellant is privileged to manufacture and sell for use in the state of Oregon the same type of containers that Oregon corporations may manufacture and sell.

There is nothing in the record of this case to support appellant's contention that the purpose of the statute is not to promote the general welfare of the state or that it is to protect domestic manufacturers of containers from competition by manufacturers of other types of containers.

The orders contain no specifications as to the material to be used in manufacturing containers. If it be true that the type of containers standardized can only be manufacturered from material obtainable in the Northwest, and advantage may result to manufacturers whose plants are located nearer to the raw material than others, that does not create a monopoly. Hardship, inconvenience or increase in cost of manufacturing does not constitute denial of privileges or immunities.

McGoun v. Illinois, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 542, 75 L. Ed. 1248, 1258.

POINT IV

The statutes and orders constitute a reasonable exercise of the police power.

Pacific States Box & Basket Co. v. Gehlhar et al., 9 Fed. Supp. 341, 342.

Detweiler v. Welch, 46 Fed. (2d) 75.

Marshall et al. v. Department of Agriculture, (Idaho, 1927) 258 Pac. 171.

Mattei y. Hecke, 99 Cal. 747, 279 Pac. 470.

Ex parte Fujii, 189 Cal. 55, 207 Pac. 537.

•

Detweiler v. Welch, 46 Fed. (2d) 75:

"The regulation of the marketing of farm and other products of a state where the same enter largely the local and interstate trade has been recognized as a legitimate exercise of the police power of the state, provided such regulation is not in conflict with an act of Congress or a regulation adopted in pursuance of such an act. Sligh v. Kirkwood, supra; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 S. Ct. 784, 56 L. Ed. 1197. A similar act of the Legislature of the State of Idaho was held by the supreme court of that state to be a valid exercise of the police power of the state. Marshall et al. v. Department of Agriculture et al., 44 Idaho, 440, 258 P. 171.

The act was designed to promote the general welfare of the industry which in turn would promote the general welfare of the state. * * *"

In *Marshall et al. v. Department of Agriculture*, 44 Ida. 440, 258 Pac. 171, the supreme court of Idaho sustained a statute authorizing the department of agri-

culture to promulgate rules, regulations and standards of marketing, branding and packing of farm products as defined by the act, requiring that the same when packed in receptacles and sold or offered for sale within the state be branded according to the standards as laid down by the department, and that such products when so packed and branded conform to such standards, and making violation of such requirements a misdemeanor, excepting therefrom such products when to be consumed or to be used in manufacturing purposes wholly within the state.

Ex parte Fujii, 189 Cal. 55, 207 Pac. 537. Fujii was arrested for unlawfully, feloniously, maliciously and wilfully selling, offering for sale and exposing for sale certain strawberries in containers holding less than one dry pint, to wit, one-half dry pint, contrary to the force and effect of a statute. Section 7 of the statute provided:

> "Sec. 7. Standard packages are hereby established as follows: * * *
>
> (2) Standard berry baskets, dry pint containing an interior capacity of approximately thirty-three and six-tenths cubic inches and dry one-half pint containing interior capacity of approximately sixteen and eight-tenths cubic inches; provided, that the standard basket for strawberries shall be the dry pint."

Section 14 of the act made it unlawful for any person

> "* * * to pack or cause to be packed for sale, or shipment, import, sale, offer for sale or deliver for shipment, any of the fresh fruits, nuts or vegetables specified in this act that do not conform to the standards herein provided."

It also made it unlawful to prepare, sell or offer for sale, a deceptive pack of fresh fruits, fresh vegetables, etc., or to mislabel any package of such fruits, nuts or vegetables. The ground upon which the classification was upheld was that it was a matter of common observation and knowledge that strawberries are, as a rule, much larger than the other varieties of berries referred to and less uniform in size and form, especially in the larger varieties.

> "It is also a matter of common observation and knowledge that strawberries cannot be placed as compactly in containers as other varieties of berries can without rendering them liable to crushing, with the consequence of their speedy degeneration and decay."

The container adopted by Oregon as standard is wider and shallower than the container manufactured by appellant, and its sides are perpendicular, whereas the sides of the container manufactured by appellant slope outward from the bottom.

Section 18-2902, Oregon Code 1930, is a legislative finding that it is proper and necessary in order to protect, further and develop the horticultural interests of the state of Oregon, that official standards for containers of horticultural products be promulgated. For that purpose the Department of Agriculture was authorized and empowered to conduct an investigation and public hearing, and fix and promulgate such standards.

The following statement is taken from the opinion of the trial court (R. 31):

> "The containers are so unlike in design, strength and material used that it requires skill and experience in

the handling and shipping of fruit to compare intelligently their respective advantages. It is presumed that the authorized legislative agency fully and fairly considered all the facts relating to the merits of the containers manufactured by plaintiff, as well as those adopted as the standards, and its determination as culminate in the orders was a finding that the standards so fixed were better adapted to carry out the beneficial objects of the legislation."

Circular No. 8, issued August, 1927, revised May, 1930, United States Department of Agriculture, Washington, D. C., relating to national standards for farm products, treats of the development of standards for farm products and of the necessity for the adoption and enforcement of such standards in order to promote the public welfare. Extracts from same, omitting illustrations, are annexed hereto as Appendix A.

United States Department of Agriculture Farmers Bulletin No. 1579, issued April, 1929, revised 1934, shows in some detail the extent to which standard containers for vegetables and fruits have been adopted by the several states. Extracts from same omitting illustrations, are hereto annexed as Appendix B.

POINT V

The statutes and orders in question do not conflict with Federal regulations.

Oregon-Washington Railroad & Navigation Co. v. Washington, 270 U. S. 87, 101, 70 L. Ed. 482, 488.

Mintz v. Baldwin, 289 U. S. 346, 350, 351, 77 L. Ed. 1245, 1249.

Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57, 60, 78 L. Ed. 1123, 1126.

Packer Corporation v. Utah, 285 U. S. 105, 76 L. Ed. 643.

39 Stat. 673, § 1; § 252, Title 15, U. S. C. A. 45 Stat. 385, § 2; § 257a, Title 15, U. S. C. A.

In addition to the acts of 1912 and 1915, fixing standards for barrels, the acts of Congress fixing standards for containers of fruits and vegetables are: Act of August 31, 1916, Chap. 426, Sec. 1, 39 Stat. 673, and Act of May 21, 1928, Chap. 664, Sec. 2, 45 Stat. 685.

The act of August 31, 1916, Chap. 426, Sec. 1, 39 Stat. 673 (§ 252, Title 15, U. S. C. A.), is hereto attached as Appendix C.

Section 2 of the Act of 1928, Chap. 664, Sec. 2, 45 Stat. 685 (§ 257a, Title 15, U. S. C. A.), is hereto attached as Appendix D.

Section 5 of 45 Stat. 686, Section 257d of Title 15, U. S. C. A., is hereto attached as Appendix E.

Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 101, 70 L. Ed. 488:

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state can not interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.
>
> Cases of the latter type are the Southern R. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. Ed. 237, 239, 32 Sup. Ct. Rep. 160; Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 435, 57 L. Ed. 284, 287, 46 L. R. A. (N. S.) 203, 33 Sup. Ct. Rep. 174; Erie R. Co. v. New York, 233 U. S. 671, 681, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; and Missouri P. R. Co. v. Stroud, 267 U. S. 404, 69 L. Ed. 683, 45 Sup. Ct. Rep. 243."

Congress has enacted statutes fixing dimensions for containers of certain agricultural and horticultural products. As to pint containers of berries it has fixed standards as to cubic contents, but not of dimensions.

Congress has legislated to the extent that standards fixed by it are suitable for use in the several states, but has left to individual states the adoption of other standards not in conflict with Federal standards as they may be required by conditions existing in the individual states.

Mintz v. Baldwin, 289 U. S. 346, 350, 351, 77 L. Ed. 1245, 1249:

"• • • Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order. The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear. Atchison, T. & S. F. R. Co. v. Railroad Commission, 283 U. S. 380, 391, 75 L. Ed. 1128, 1136, 51 S. Ct. 553; Carey v. South Dakota, 250 U. S. 118, 122, 63 L. Ed. 886, 888, 39 S. Ct. 403; Savage v. Jones, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 S. Ct. 715; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623, 42 L. Ed. 878, 881, 18 S. Ct. 488."

Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 60, 78 L. Ed. 1126:

"• • • The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 290, 58 L. Ed. 1312, 1317, 34 S. Ct. 829. Cf. Napier v. Atlantic Coast Line R. Co. v. Georgia, 272 U. S. 605, 71 L. Ed. 432, 47 S. Ct. 207. The purpose exclusively to regulate need not be specifically declared. New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. Ed. 1045, 37 S. Ct. 546, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680. But ordinarily such intention will not be implied unless, when fairly interpreted, the Federal measure is plainly inconsistent with state regulation of the same matter. Illinois C. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 1279."

POINT VI

The burden is upon appellant to show that the statutes and orders exceed the constitutional power of the state in the particulars in which they apply to it.

Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. Ed. 1155, 1160.

Armour & Co. v. North Dakota, 240 U. S. 510, 513, 60 L. Ed. 771, 774.

Union Pacific R. R. Co. v. United States (Sinking Fund cases), 99 U. S. 700, 718, 25 L. Ed. 496, 501.

Livingston Co. v. Darlington, 101 U. S. 407, 410, 25 L. Ed. 1015, 1017.

Price v. Illinois, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405.

Hebe Co. v. Shaw, 248 U. S. 297, 303, 63 L. Ed. 255, 259.

Schmidinger v. Chicago, 266 U. S. 578, 587, 588, 57 L. Ed. 364, 368.

Powell v. Pennsylvania, 127 U. S. 678, 683, 686, 32 L. Ed. 253, 256, 257.

Hardware Dealers Mutual Fire Insur. Co. of Wisconsin v. Glidden Co., 284 U. S. 151, 158, 76 L. Ed. 214, 219.

Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725.

It is appellant's contention that if the containers manufactured by it are as good for the purposes for which such containers are used as those required by the orders of the Department of Agriculture, the orders and the law pursuant to which they were adopted are invalid.

Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. Ed. 1155, 1160:

"• • • Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 562, 55 L. Ed. 328, 336, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, ante, 1011, 34 Sup. Ct. Rep. 612."

Armour & Co. v. North Dakota, 240 U. S. 510, 513, 60 L. Ed. 771, 774:

"• • • We said but a few days ago that if a belief of evils is not arbitrary, we can not measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. • • •"

Union Pacific R. R. Co. v. United States (Sinking Fund Cases), 99 U. S. 700, 718, 25 L. Ed. 496, 501:

"• • • Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government cannot encroach on the domain of another

without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Livingston Co. v. Darlington, 101 U. S. 407, 410, 25 L. Ed. 1015, 1017:

"In determining whether the General Assembly of Illinois has transgressed the fundamental law of that State, we recall what this court said in Fletcher v. Peck, 6 Crench, 128, where it became our duty to consider whether a statute of Georgia was in conflict with its Constitution.

'The question,' said Chief Justice Marshall, 'whether a law be void for its repugnancy to the Constitution is, at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its Acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of the incompatibility with each other.'

The language was cited with approval in R. R. Co. v. Smith, 62 Ill. 268, where the Supreme Court of Illinois added:

'Enough has been cited to show the firm position of the judiciary, that the courts ought not and, in justice to the rights of a co-ordinate department of the State Government, can not, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity.' Lane v. Dorman, 4 Ill. (3 Scam.) 238; People v. Marshall, 6 Ill. (1 Gilm.), 672."

Price v. Illinois, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405. In this case the plaintiff offered evidence that the canning compound involved was not injurious to health or to the human system, which evidence was re-

jected and the defendant's excepted. In that case the court said:

> "• • • It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided. • • •"

Hebe Co. v. Shaw, 248 U. S. 297, 303, 63 L. Ed. 255, 259, involved the question of whether or not a food product composed of condensed skimmed milk and cocoanut oil was injurious to health. The court said:

> "• • • If the character or effect of the article, as intended to be used 'be debatable, the legislature is entitled to 'ts own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' "

Schmidinger v. Chicago, 266 U. S. 578, 587, 588, 57 L. Ed. 364, 368. This involved the validity of an ordinance of the city of Chicago fixing weight standards for loaves of bread. The court said:

> "• • • This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred. Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U. S. 207, 233, 48 L. Ed. 148, 158, 24 Sup. Ct. Rep. 124; McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 29 Sup. Ct. Rep. 206."

Powell v. Pennsylvania, 127 U. S. 678, 683, 686, 32 L. Ed. 253, 256, 257:

"It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court can not say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. 'Every possible presumption,' Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 718 (25:501) 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' See also Fletcher v. Peck, 10 U. S. 6 Cranch. 128 (3:175); Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 625 (4:629,656); Livingston County v. Darlington, 101 U. S. 407 (25:1015).

Page 257:

"• • • The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manu-

> facturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government."

Hardware Dealers Mutual Fire Insurance Company of Wisconsin v. Glidden Company, 284 U. S. 151, 158, 76 L. Ed. 214, 219:

> "The record and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163, 51 S. Ct. 130; see Standard Oil Co. v. Marysville, 279 U. S. 582, 584, 73 L. Ed. 856, 859, 49 S. Ct. 430; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 397, 71 L. Ed. 1115, 47 S. Ct. 630. We can not assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded."

The object in providing standards for containers of horticultural products is declared in Section 18-2902, Oregon Code 1930, to be "to promote, protect, further and develop the horticultural interests of the state".

It is to be assumed that the legislature determined the necessity for the adoption of regulations providing such standards, and it is stated in the order of April 15, 1933 (R. 10-13), that the proceedings were conducted as provided by statute.

The adoption of some definite standard for containers was necessary if the packing, handling and marketing of such products in any kind of container the person interested might adopt is to be prevented.

There is nothing in the record of this case to sustain appellant's contention that the administrative officers acted in an arbitrary or unreasonable manner, or that in selecting the type of container fixed by the order they had any intention of discriminating against appellant.

The burden is upon appellant to show, not only that the type of container manufactured by it is better for the purposes designated by the legislature than the one fixed and promulgated by the administrative officers but also that the selection of another type was arbitrary and unreasonable.

Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725.

The advantages stated in Appendices A and B of this brief to result from the fixing of standards for containers are matters of common knowledge. The exhibits are published by a department of the United States government specially informed in such matters and qualified by training and experience to discuss same.

POINT VII

The record does not rebut the presumption that constitutional powers have not been exceeded.

Borden's Farm Products Co. v. Baldwin, 79 L. Ed. Advance Opinions, 127-198.

Appellant apparently relies upon the opinion of this court in *Borden's Farm Products Co. v. Baldwin*, 79 L. Ed. Advance Opinions, 127-198, Supreme Court Law Edition Advance Opinions 1934-1935, as having overruled former decisions holding that there is a presumption that an order of an administrative board or official is constitutional and valid.

In this connection we quote the following from the opinion in that case, page 132, headnote No. 2:

"• • • In view of the peculiar nature and effect of this provision, and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court, unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right. Accordingly, we pass to the consideration of the various grounds that are suggested as adequate support for the legislative action."

Also page 135, headnote 4:

"• • • When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof,

that the action is arbitrary. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 397, 71 L. Ed. 1115, 1120, 47 S. Ct. 630; Lawrence v. State Tax Commission, 286 U. S. 276, 283, 76 L. Ed. 1102, 1107, 52 S. Ct. 556, 87 A. L. R. 374. The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (Smith v. Cahoon, 283 U. S. 553, 567, 75 L. Ed. 1264, 1269, 51 S. Ct. 582) or that may appear by facts admitted or proved. Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. Ed. 536, 541, 30 S. Ct. 287, 17 Ann. Cas. 1247; Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 85, 69 L. Ed. 169, 177, 45 S. Ct. 12; Concordia F. Ins. Co. v. Illinois, 292 U. S. 535, 549, 78 L. Ed. 1411, 1420, 54 S. Ct. 830. Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. Ed. 679, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Radice v. New York, 264 U. S. 292, 68 L. Ed. 690, 44 S. Ct. 325; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. Ed. 1115, 47 S. Ct. 630, supra; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determination upon evidence, so that conclusions shall not be reached without adequate factual support."

POINT VIII

It is not essential to the validity of the orders that they be supported by findings.

Borden's Farm Products Co. v. Baldwin, 79 Law. Ed. Advance Opinions, 127, 135.

Wichita R. R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. Ed. 124.

Mahler v. Eby, 264 U. S. 32, 44, 68 L. Ed. 549, 556.

Southern Railway Co. v. Virginia, ex rel. Shirley, 290 U. S. 190, 197, 78 L. Ed. 260, 266.

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. Adv. Opinions, 223, 238.

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. Ed. 240, 246.

Appellant contends that the orders of the Department of Agriculture are invalid under rules applied by this court in *Witchita R. R. & L. Co. v. Public Utilities Commission*, 67 L. Ed. 124, 130; *Mahler v. Eby*, 264 U. S. 32, at 34, 68 L. Ed. 549, at 556; *Borden's Farm Products Co. v. Baldwin*, 79 L. Ed. Advance Opinions, 130, at 135; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. Advance Opinions, 223, 238, 55 S. Ct. 241, and *Southern Railway Co. v. Virginia ex rel. Shirley*, 290 U. S. 190, at 197, 78 L. Ed. 260, at 266, 54 S. Ct. 148.

Appellees submit that the cases relied upon by appellant do not support its contention.

We quote from the opinion in *Wichita R. R. & L. Co. v. Public Utilities Commission*, page 58, U. S. Rep., 130 L. Ed., as follows:

> "The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that, after full hearing and investigation, the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that, for lack of such a finding, the order in this case was void.
>
> This conclusion accords with the construction put upon similar statutes in other states. State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co., 291 Ill. 209, P. U. R. 1920C, 640, 125 N. E. 891; State Public Utilities Co. v. Baltimore & O. S. W. R. Co. 281 Ill. 405, P. U. R. 1918B, 655, 118 N. E. 81. Moreover it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent

to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

Mahler v. Eby, 264 U. S. 32, at 44, 68 L. Ed. 549 at 556:

"* * * It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfilment of that condition should appear in the record of the act. In Wichita R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. Ed. 124, 43 Sup. Ct. Rep. 51, a statute of a state required that a public utility commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case, made after a hearing, and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute, but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to execute agencies, we said (p. 59):

'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.'"

We quote from appellant's brief, page 17, as follows:

"While there is a rebuttable presumption of fact as to the constitutionality of an act of the legislature (Borden's

> Farm Products Co. v. Baldwin, 79 L. Ed. Ad. Op. 130), there is no such presumption of constitutionality or validity of an order of an administrative official."

The quotation from *Southern Railway Co. v. Virginia ex rel. Shirley*, on page 16 of appellant's brief, reads as follows:

> "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the Legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

We do not find anything in the opinion referred to more nearly supporting appellant's contention than its quotation therefrom above referred to. The Virginia act involved in *Southern Railway Company v. Virginia ex rel.*, supra, was held to be invalid for the reason that it permitted the Highway Commissioner, an executive officer—without notice or hearing—to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. We quote from the opinion in that case as follows (p. 197, U. S. Rep., 266 of L. Ed.):

> "* * * But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

(P. 199, U. S. Rep., 266 L. Ed.):

"The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion."

On page 16 of its brief, appellant quotes the following from *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. Adv. Ops. 223, 238, 55 S. Ct. 241:

"If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determination of facts, those determinations must be shown."

We quote further from the opinion in that case as follows (p. 238):

"• • • When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. • • •"

In *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394, 56 Law. Ed. 240, 246, this court stated the rule which appellees have understood to be applicable to the instant case:

"The remaining contention is that the act is repugnant to the state Constitution because it attempts to delegate to the board of agriculture the exercise of legislative powers. The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure, and afford a satisfactory light, and it was left to the board of agriculture to determine what oils would measure up

to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable. Buttfield v. Stranahan, 192 U. S. 492, 48 L. Ed. 534, 24 Sup Ct. Rep. 349; Union Bridge Co. v. United States, 204, U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616; United States v. Grimaud, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480."

POINT IX

The contention that the statutes involved constitute an unlawful delegation of legislative authority to administrative officers is not open to consideration by this court, for the reason that it was not raised in the court below, nor assigned as error in this court.

Rule 13, paragraph 9, Rules of U. S. Supreme Court.

Appellant's original contentions are set out on pages 8 and 9 of its brief.

Appellant adopted its assignment of errors and represented that the whole of the record as filed is necessary for the consideration of the case (R. 42).

Neither the assignment of errors nor any other part of the record contains a statement that appellant will rely upon the point now presented and urged in its brief, page 50, that:

"III. The statute, under the authority of which the challenged orders were made, constitute an unlawful delegation of authority to administrative officials."

In view of the rule that the court at its opinion may notice a plain error not assigned or specified, appellees, without waiving their objection to consideration of the point by this court, respectfully submit:

POINT X

There has been no unlawful delegation of legislative power in connection with the issuance of the orders complained of in this case.

Van Winkle v. Fred Meyer, Inc., Vol. 21, No. 3, Advance Sheets, Cases Decided in the Supreme Court of the State of Oregon, 85, 89, 90, 91, 94.

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. Adv. Ops., 223, 232, 235, 236.

Schechter v. United States, 79 L. Ed. Adv. Ops., 888, 895, 901.

Appellant argues that the statutes and orders are invalid because the authority conferred by section 18-2902, Oregon Code 1930, is only "to promote, protect, further and develop the horticultural interests of this state".

Said section is section 2 of chapter 57, General Laws of Oregon, 1923. The title of that act reads as follows:

> "An Act to authorize the Oregon state board of horticulture to fix and promulgate standards for all kinds of horticultural, viticultural and vegetable products and containers therefor; providing for inspection of such products and containers, and for the observance and enforcement of standards so fixed and promulgated, and repealing chapter 206, General Laws of Oregon, 1921."

The promotion of the general welfare of the state is, therefore, clearly within the purpose of the act as expressed in the title.

Although the main purpose in adopting standards for containers of horticultural products is primarily to promote, protect, further and develop the horticultural interests of the state, the adoption and enforcement of such standards also promotes the general welfare. The need of standardization of containers for agricultural and horticultural products has been long recognized and provided for by the Federal government and by the several states, and comes so clearly within the scope of the police power of the state as to no longer present an open question.

That appellant does not question the authority of the state under the police power to provide standards for containers of horticultural products, except as they relate to the dimensions of strawberry and raspberry containers, is indicated by the following statement taken from page 59 of its brief:

> "Appellant believes that the orders in question in so far as they relate to strawberry and raspberry containers and the supporting statutes should be declared unconstitutional and void."

The decision of the supreme court of Oregon in the case of *Van Winkle v. Fred Meyer, Inc.*, in so far as it relates to improper delegation of authority by the legislature, is based upon Article IV, section 1, of the Constitution of Oregon, which divides the powers of government into the executive, the administrative, and judicial departments, and provides that each of said departments is prohibited from exercising any of the powers conferred upon either of the others. This provision of the state constitution was not originally in-

voked by appellant, nor was a like provision of the Federal constitution.

The additional question thus presented will be discussed from the standpoint of whether or not the error now assigned relates to a question of power, and is therefore a plain error which may be considered by this court in the absence of an assignment.

The grounds upon which the Oregon statute was held invalid in the case of *Van Winkle v. Fred Meyer, Inc.*, supra, were, p. 89, Advance Sheets:

> "* * * to subject all persons engaged in the business or industry covered by the act to marketing agreements having the force and effect of law, whether they have assented thereto or not, for a violation of which their goods may be forfeited and they themselves become subject to criminal prosecution, against which, if the law is valid, they can make no defense. To accomplish that result, all that is necessary to be done is to have a substantial majority, measured in dollars or units of output, of the persons engaged in any particular line or branch of the industry or business covered by the act formulate or approve such an agreement and submit the same to the governor, who is bound to approve the agreement unless he finds that it has not been approved by such a majority or that its provisions are inequitable to the producers or contrary to the interests of the consumers or the general public. Under these provisions, a preponderant majority engaged in any particular line or branch of industry or business covered by the act may, with or without the assent of the others likewise engaged, fix the price of any commodity covered by the agreement and limit and restrict the amount which may be produced or sold. In granting these coercive and unrestrained powers to an indefinite and indeterminate group of persons, the act contains no limitation or restriction upon the exercise by them of the powers so conferred, nor does it prescribe any definite or intelligent rule, standard or guide by which their exercise of such powers is to be governed or their discretion con-

trolled, and leaves wholly to such majority the determination of whether there shall be a law at all and, if there is to be a law, what the terms thereof shall be."

After referring to Article 4, section 1, of the Constitution of Oregon, dividing the powers of government into the legislative, executive and administrative departments, and prohibiting each of said departments from exercising any of the powers conferred upon either of the others, the court said, page 90:

"* * * Under these provisions the legislature can not confer upon any person, officer, agency or tribunal the power to determine what the law shall be. * * *"

Page 91:

"Under the very terms of the act in question, there is to be no law fixing the price of any commodity or regulating its production or sale unless a preponderant majority engaged in its production or sale formulate an agreement and secure its approval by the governor. Under the specific directions of the act, when this has been done, the prices so fixed and the regulations so adopted are to become the law of the state, but if no agreement is entered into, then there is to be no law. This leaves wholly to persons outside of the legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be. It is impossible to conceive of a more complete delegation of legislative power and, since the act contravenes the plain provisions of our constitution in that it attempts to make an unlawful and unauthorized delegation of legislative power, the act is unconstitutional and void. * * *"

Page 94:

"The further objection that this act is unconstitutional because it contains no standard or guide and prescribes no rule of law by which the powers conferred under the act are to be exercised must also be sustained. It is a fundamental principle of constitutional law that in delegating

> powers to an administrative body the legislature must prescribe some rule of law or fix some standard or guide by which the actions of that body, in administering the law, are to be governed and made to conform. Under this act, there is no rule of law, nor is there any standard or guide prescribed by which the persons to whom the powers are to be delegated are to be controlled or to which they must conform. On the contrary, it leaves to the uncontrolled will of a preponderant majority of any branch of the industry, covered by the act, the power to fix any price and to make any regulation and places no limitation upon the exercise by them of such powers and no limit beyond which they may go in the fixing of prices or in the making of regulations. In the formulation of the agreement, everything is to be left under the act to the unfettered and uncontrolled discretion of the preponderant majority.
>
> The act further provides that the agreement, when formulated and approved, shall be administered by a control board and prescribes that 'the duties and powers of such board shall be such as are specified for it in the marketing agreement or from time to time delegated to it by the governor or the state director of agriculture', and there is no limitation placed in the act as to what powers may be thus delegated, or as to what the control board may do."

Under this statute the function of the officers of the department of agriculture is to fix standards for purposes designated by the legislature and within limitations prescribed by the legislature.

At page 94 of the report in the case of *Van Winkle v. Fred Meyer, Inc.*, supra, the supreme court of Oregon quoted with approval the following excerpt from the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388 (79 L. Ed. 223, 55 S. Ct. 241):

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of

details with which the national legislature can not deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

It is contended by appellant that the use of the words "authorized and empowered" in section 18-2902, Oregon Code 1930, makes it optional with the administrative officers whether or not they will adopt or promulgate any standards.

Among other cases referred to in appellant's brief as supporting its contention are *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. Ad. Ops. 233, 55 S. C. 241, and *Schechter v. United States*, 79 L. Ed. Adv. Ops. 888, 55 S. Ct. 837.

In the first case it was said, page 232, Advance Opinions, headnote 6:

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature can not deal directly. The Constitution has never been regarded as deny-

ing to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, can not be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

Page 235:

"Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature. Wayman v. Southard, 10 Wheat. 1, 43, 6 L. Ed. 253, 262. In Buttfield v. Stranahan, 192 U. S. 470, 496, 48 L. Ed. 525, 535, 24 S. Ct. 349, the Act of March 2, 1897 (29 Stat. at L. 604, 605, chap. 358, U. S. C. title, 21 § 41) was upheld, which authorized the Secretary of the Treasury, upon the recommendation of a board of experts, to 'establish uniform standards of purity, quality, and fitness for the consumption of all kinds of teas imported into the United States.' The Court construed the statute as expressing 'the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality.' The Congress, the Court said, thus fixed 'a primary standard' and committed to the Secretary of the Treasury 'the mere executive duty to effectuate the

legislative policy declared in the statute'. 'Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.' See Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. Ed. 240, 245, 32 S. Ct. 152."

Page 236:

"The provisions of the Radio Act of (February 23), 1927 (44 Stat. at L. 1162, 1163, chap. 169, U. S. C. title 47, § 81), providing for assignments of frequencies or wave lengths to various stations, afford another instance. In granting licenses, the Radio Commission is required to act 'as public convenience, interest, or necessity requires'. In construing this provision, the Court found that the statute itself declared the policy as to 'equality of radio broadcasting service, both of transmission and of reception,' and that it conferred authority to make allocations and assignments in order to secure, according to stated criteria, an equitable adjustment in the distribution of facilities. The standard set up was not so indefinite 'as to confer an unlimited power'. Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co. 289 U. S. 266, 279, 285, 77 L. Ed. 1166, 1175, 1178, 53 S. Ct. 627, 89 A. L. R. 406."

We quote from the case of *Schechter v. United States*, Vol. 79, L. Ed. Adv. Ops., p. 895:

"We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature can not deal directly. We pointed out in the Panama Ref. Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."

Page 901:

"To summarize and conclude upon this point: § 3 of the recovery act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure.

Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in § 1.

In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.

We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

In conclusion, appellees respectfully submit that the statutes and orders involved in this suit are within the police power of the state; that the orders were duly promulgated pursuant to and in the manner required by statutes of the state of Oregon. That if, however, the court is of the opinion that said statutes and orders, or either of them, are unconstitutional, they should not be set aside except upon the complaint of one to whom they directly apply.

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APPENDIX A

Circular No. 8, Issued August, 1927; revised May, 1930, United States Department of Agriculture, Washington, D. C., National Standards for Farm Products, pp. 24, 25.

CONTAINERS FOR FRUITS AND VEGETABLES

Standard containers for marketing fruits and vegetables are of more interest to the average citizen than he generally realizes. He is at all times a consumer of some commodity and may be a grower or shipper of other commodities, a manufacturer of containers, or an official of a railroad, steamship line, or other carrier. As a consumer he is frequently defrauded by the substitution of short-measure packages at the full-measure price. The cost of marketing is increased by the greater expense of manufacturing a large number of styles and sizes by breakage in transit, which may be due to weak packages, to improper stowage, or to the difficulty of loading odd-sized containers.

Standardization means to the manufacturer that production is simplified and that he can concentrate on a few sizes, with consequent lowering of costs. To the carrier it means the elimination of many sizes that now complicate the problem of damage in transit, and it narrows the container problem to a few sizes for which standard strength specifications can be worked out and approved methods of stowing and bracing can be devised. The grower or shipper benefits by any action that lowers the cost of manufacture and tends to reduce breakage in transit. In addition, standard containers provide him with a definite basis of sale so far as the size of his package is concerned. He is thus relieved of unfair competition through use by his competitor of a short package.

Three Federal laws have made certain standard containers compulsory for the marketing of fruits and vegetables. These are the United States standard barrel act and the standard container acts of 1916 and 1928.

The first of these, the standard barrel act, passed in 1915, established the standard fruit barrel of 7,056 cubic inches and its subdivisions, and the standard cranberry barrel of

5,826 cubic inches and its subdivisions. The standard fruit and vegetable barrel, which is ordinarily supposed to contain 3 bushels, actually holds 9 quarts in excess of that quantity. In establishing this standard, theoretical considerations were laid aside and the same dimensions and capacity as those of the flour barrel were adopted. The standard cranberry barrel was designed to hold 100 pounds of cranberries. The subdivisions of both barrels are three-quarter barrel, one-half barrel, and one-third barrel. The standard barrel act is enforced by the Bureau of Standard of the United States Department of Commerce, and in those states that have legally adopted the Federal standard by the local sealer of weights and measures. The law has been reenacted by at least 17 states and by the District of Columbia.

Closely following the adoption of the standard barrel act, the standard container act of 1916 was passed in 1916. This legislation established three standard sizes of Climax or grape baskets of 2, 4, and 12 quarts capacity, and standard berry boxes and till baskets containing dry one-half pint, dry 1 pint, dry 1 quart, and multiples of the dry quart. A large number of unnecessary sizes of these containers was eliminated by this act, the reductions amounting to 82, 84, and 93 percent for berry boxes, till baskets, and Climax baskets, respectively. (Fig. 7.) This simplification of sizes has improved marketing conditions for the produce shipped in these containers because there is now no question as to the size of the containers. It works to the benefit of growers, shippers, and consumers. To the manufacturer it has meant a reduction in the number of forms necessary to supply his customers, the possibility of making up stock in advance of orders, and extension of his market, because the containers which he now makes are in use the country over.

The material benefits accruing from the standard container act of 1916 resulted in a demand for and the ultimate passage in 1928 of the second standard container act. This act fixes the standard sizes of hampers and round stave baskets, including the type known as "straight side" or "tub" baskets, and splint baskets. Nine standard sizes of hampers and round stave baskets are provided—⅛, ¼, ½, ⅝, ¾, 1, 1¼, 1½, and 2 bushels. Splint baskets are standardized in six sizes of 4, 8, 12, 16, 24, and 32 quarts capacity.

APPENDIX B

U. S. Department of Agriculture Farmers' Bulletin No. 1579, Containers Used in Shipping Fruits and Vegetables, issued April, 1929, revised 1934, pages 1, 2, 7, 8 and 9:

The containers used in shipping fruits and vegetables are of vital importance in the handling of these commodities. More than a million carloads of fruits and vegetables are shipped annually in the United States. The greater part of this produce is packed in containers of some sort. To package this great quantity requires more than one billion containers, representing an investment of several million dollars.

The containers used are of five types—baskets, crates, boxes, barrels, and sacks. The baskets used are of seven types—berry, till, hamper, round stave, straight side or tub, splint or market, and Climax or grape baskets. Crates and boxes have either panel or solid ends, and are made either of rotary-cut or of sawn material. The barrels are of three sizes—the standard fruit and vegetable barrel, the standard cranberry barrel, and the 4-bushel barrel. The fruit and vegetable barrels are of three types—stave, open-stave, and veneer. Sacks are generally made of jute, but may be made of cotton or other fibers.

The containers in use for shipping a given commodity may vary widely in different sections of the country. For the same kind of vegetable one section may use a basket, another a crate, a third a barrel, and a fourth a sack. The increase in the production of fruits and vegetables, the increase in carload shipments of these commodities, the development of producing sections, the introduction of new types of containers, the penetration into one section of types of containers popular in other sections, and the keen competition between many producing sections have served to stimulate interest on the part of farmers in the containers used throughout the country for the kinds of fruits and vegetables they grow and ship. It is impossible to mention all the different containers that may be used in different sections at various times. Some commodities are

shipped from individual sections in such small quantities that the use of no particular container has been developed, and whatever is handy is used. Again, fruits and vegetables taken into city markets by nearby farmers may move in a variety of containers. For instance, in one New England city spinach was found on the market in lettuce crates, egg cases, orange boxes, and hampers. In this bulletin an effort is made to mention the containers most favored by the important shipping sections.

Berries of all kinds are packed in one-half pint, pint, and quart baskets known as boxes or cups; crates are used only as secondary shipping containers for the berry boxes or cups. Six types of boxes are in use—the American, Hallock, Leslie, stitched tray, metal rim, and paper. Special crates have been developed to fit these types. Unfortunately, there is considerable variation in the dimensions of crates for particular types of boxes.

In the eastern section of the country the most popular type of box is the American. The crates generally used hold 24 pints, 24 quarts, and 32 quarts (figs. 8, 9, and 10). Sixty-pint and sixty-quart crates are used to some extent in the Eastern Shore and Norfolk sections. A crate holding 36 oblong pint cups is used in New Jersey and has become predominnant in Florida. Typical inside dimensions of the crates in most common use in the East are as follows:

Capacity and type of crate	Inside dimensions (inches)	Length of slat (inches)
24-pint	9 by 9 by 18	20
24-quart	11 by 11 by 22	24
32-quart nailed top	14¼ by 11 by 22	24
32-quart hinged top	14⅞ by 11 by 22	23⅛
36-oblong-pint	9 by 11 by 22	24

The American type of box is also used in a special container, known as a pony refrigerator, used in the shipment of early strawberries from southern Florida (figs. 11 and 12). This is a heavy case, usually holding eight 1-quart boxes or 150 oblong pints. The layers of boxes are separated by dividers

of the type used in the ordinary crates. Metal trays are placed in the center or in the top of the box, or both, to hold a supply of ice. Airtight covers are clamped on after the berries and ice are in place. These pony refrigerators are well adapted to long-distance express shipments when it is not possible to load full cars and when prices are high. An objection occasionally raised is that the ice pans sweat and allow water to drop on the berries, causing some injury. These refrigerators must be returned to the owner after being emptied.

On the Pacific coast only half-pint and pint berry cups are used. These are of three types—metal rim, stitched tray, and Hallock (fig. 13). The first two are used in California, a large part of the stiched trays being made of paper. The Hallock is used in Oregon and Washington. The half-pint berry cups are used mainly for shipping raspberries. The 24-pint crate is the most popular size for Hallocks; this crate is made in a number of different styles.

The following are dimensions of typical Pacific coast berry crates:

Capacity and type of crate	Inside dimensions (inches)	Length of slat (inches)
12-pint Hallock	3½ by 13¾ by 18	19¾
12-pint San Jose	2⅞ by 13½ by 18⅛	19½
12-pint Imperial Valley	3¾ by 13½ by 17	19
15-pint Los Angeles	3¾ by 13½ by 22¼	23
24-pint shallow Hallock	5⅛ by 16½ by 22¼	24½
24-pint deep Hallock	6 by 13¾ by 18⅜	19¾

APPENDIX C

39 Stat. 673, § 1; § 252, Title 15, U. S. C. A.:

"§ 252. Standard basket or container for small fruits and vegetables. The standard basket or other container for small fruits, berries and vegetables shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart.

(a) The dry half pint shall contain sixteen and eight-tenths cubic inches.

(b) The dry pint shall contain thirty-three and six-tenths cubic inches.

(c) The dry quart shall contain sixty-seven and two-tenths cubic inches."

APPENDIX D

45 Stat. 385, § 2; § 257a, Title 15, U. S. C. A.:

"§ 257a. Standard splint baskets. The standard splint baskets for fruits and vegetables shall be the four-quart basket, eight-quart basket, twelve-quart basket, sixteen-quart basket, twenty-four-quart basket, and thirty-two-quart basket, standard dry measure. For the purposes of this subdivision of this chapter a quart standard dry measure has a capacity of sixty-seven and two-tenths cubic inches.

(a) The four-quart splint basket shall contain two hundred and sixty-eight and eight-tenths cubic inches.

(b) The eight-quart splint basket shall contain five hundred and thirty-seven and six-tenths cubic inches.

(c) The twelve-quart splint basket shall contain eight hundred and six and four-tenths cubic inches.

(d) The sixteen-quart splint basket shall contain one thousand and seventy-five and twenty-one one-hundredths cubic inches.

(e) The twenty-four quart splint basket shall contain one thousand six hundred and twelve and eight-tenths cubic inches.

(f) The thirty-two quart splint basket shall contain two thousand one hundred and fifty and forty-two one-hundredths cubic inches."

APPENDIX E

Section 5 of 45 Stat. 686, sec. 257d, Title 15, U. S. C. A.:

"§ 257d. Violations; what constitutes; punishment; guaranty against prosecution. It shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this subdivision of this chapter: Provided, That this subdivision of this chapter shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of sections 251 to 256 of this title, and the regulations thereunder. * * *"